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Supreme Court of the United States

OCTOBER TERM, 1956

NO. 865

FRANK COLLURA, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND APPENDIX

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

FRANK COLLURA, the petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of the Commonwealth of Pennsylvania, made and entered February 8, 1957, refusing to review the decision of the Superior Court of Pennsylvania, sustaining his conviction, state remedies now having been exhausted.

OPINIONS BELOW

The opinion of the Courts of Oyer and Terminer and Quarter Sessions of the Peace of Allegheny County, Pennsylvania was not reported, but is printed in the state court record (R. 195a). The Superior Court's opinion is reported in 183 Pa. Superior 17 and in 128 A2d 101. No Opinion was filed by the Supreme Court of Pennsylvania, but an order was entered dismissing the

Petition for Allowance of Appeal. Copies of the opinion of the Superior Court and of the order of the Supreme Court are annexed to this Petition as Appendix I.

JURISDICTION

(i) The order sought to be reviewed was dated and and entered February 8, 1957.

(ii) A Petition for Allowance of appeal from the judgment of the Superior Court of Pennsylvania was filed in the Supreme Court of Pennsylvania on January 4, 1957 and was denied by the court on February 8, 1957. No order has been sought or granted to extend the time within which to petition for certiorari.

(iii) The statutory provisions believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari are 28 U.S.C., sections 1257 and 2254.

QUESTION PRESENTED FOR REVIEW

Whether the Fair Trial Guaranteed by the Due Process Clause of the Fourteenth Amendment Entitles Petitioner to Review by This Court, Where It Is Contended That the Charge of the Trial Court Distorted the Testimony and Overemphasized the Evidence Offered by the Commonwealth.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1 "* * * nor shall any state deprive any person of * * * liberty * * * without due process of law".

STATEMENT OF THE CASE

Petitioner, Frank Collura, was tried in the Courts of Oyer and Terminer and Quarter Sessions of the Peace of Allegheny County, Pennsylvania on ten indictments, six of which charged robbery and four impersonating an officer. He was acquitted on six of the ten indictments, but found guilty on three charges of robbery and one of impersonating an officer.

The *modus operandi* in all cases was exactly the same. The victim was accosted by a person in an automobile, who represented himself to be a detective or other officer conducting an investigation and ordered the victim to get into the car. Once there, the victim was searched, under the pretext of ascertaining whether he carried a knife, razor or gun, and relieved of his valuables. In all cases the victims were elderly men, receiving Social Security or pension benefits.

Petitioner's arrest came in connection with the complaint of one Haas, aged 73, who was robbed on January 20, 1956 under the circumstances described above. The robbery was reported to the police at 10:20 A.M. on that date, as having occurred a few minutes earlier. The police report described the car driven by the robber as green and cream bearing a license number of which the first four numerals and letters were 31EE and the fifth number, or letter as "1" or "F". A check disclosed that the car bearing license plate number 31EE1 was owned by Petitioner's daughter and on the same day of the robbery he was placed under arrest. Haas identified him first from a picture taken from police files and later that day at a stand-up.

The second victim, Alexander, aged 68, had previously reported a similar occurrence to the police, including the information that the first part of the license plate number was 31EE (R. 65a). He could not describe the automobile, but the couple who came along immediately after he had left the robber's car saw it and described it to the police as a 1952 Pontiac. Alexander described the robber as a heavy man about six feet tall, with no special identifying marks or speech characteristics (R. 74a-75a). Brought in after Collura's arrest, Alexander identified him at the stand-up.

In the third case where verdicts of guilty of robbery and impersonating an officer were returned, Catino, aged 77, described the robber as a "Pollock" and the car as "like a cream, like a white" (R. 84a). He made no complaint until he saw Collura's picture in the newspaper (R. 80a). He attended the same stand-up as had Alexander and Haas and was the first to identify Collura (R. 89a).

In the cases in which Petitioner was found not guilty the identifications were equally positive, except in one case, where the victim (Elferling), who had previously identified Petitioner at the stand-up failed to pick him out in the courtroom. The stories varied widely, however, as to the color of the automobile used, it being variously described as gray (Elferling), black (Villabobos), yellow (Bayscura) and blue (D'Orazio). Petitioner's daughter's car was a 1953 Buick, pastel blue and ivory. Two of these victims had reported their robberies to the police, but the others had complained only after the picture and news story appeared in the papers.

Petitioner sought to prove that this was a case of mistaken identity, and offered a substantial alibi in the

case on which his arrest originally occurred. This alibi was supported by two disinterested witnesses, a bank clerk and the secretary in a squire's office. These witnesses accounted for his time from 9:30 A.M. to after 11:00 A.M. The crime in question as reported to the police occurred shortly before 10:20 A.M. On trial the victim, Haas, stated that he had no knowledge of when the crime had been committed, except that he had left home around 9:00 A.M. (R. 53a), went to the bank, stopped at the grocery store and the shoe-makers, and was at a place about two miles from the bank when he was picked up by the Petitioner in his car.

The case against Petitioner actually rests upon the testimony of Haas. Although Alexander testified he had observed a license number 31EE—, the car bearing this plate number was described by two witnesses as a 1952 Pontiac whereas Petitioner's car was a 1953 Buick. Moreover, the description of the robber given by Alexander immediately after the crime, as a heavy man about six feet tall does not fit Petitioner, who is only five feet, six inches.

As to Catino, the victim in the third case in which Petitioner was found guilty, he described the car as cream or white (R. 84a) and had seen Collura's picture in the paper before he made the identification at the stand-up. The other victims likewise had the advantage of observing Petitioner's photograph in the newspapers prior to identifying him. It is significant also that four other persons, who had been robbed in the same manner as in the cases here in question, failed or refused to identify Petitioner at stand-up (R. 109a).

Police testimony related to the complaints received, the identification made by the various victims at the

standup, the identification by Haas of Petitioner's automobile, which was based upon the license number and a mark on the side where the dirt had allegedly been brushed off as it pulled away from Haas, and the investigation of the license number reported by Haas. It appeared that when the police department received the report that the license number was 31EE— the officer, believing that there could be no license number 31EEF, checked 31EE1 and when he found the automobile belonged to Collura's daughter he looked no further. Collura was known to the police by reason of several previous gambling convictions and a manslaughter growing out of a fight.

On trial Petitioner offered proof that in the series 31EE1—9 there were the names of five persons in the Pittsburgh area, none of whom were interviewed by the police. No effort was made to locate the owner of a Pontiac with a license number similar to that of the car driven by Collura, despite the positive testimony in the Alexander case that the license number was 31EE— and the car a 1952 Pontiac (R. 33a).

Despite the strength of the alibi in the principal case and the weakness of the identification both as to the automobile and the robber, Petitioner was nonetheless found guilty as to three of the robberies and on one companion charge of impersonating an officer.

It is our contention that this would not have occurred had it not been for the bias and partiality in the charge of the trial court, evidenced by mis-statement and distortion of the testimony and the undue emphasis placed upon the Commonwealth's evidence. It is this aspect of the case which causes us to seek review in this Court.

HOW AND WHEN FEDERAL QUESTIONS RAISED AND THEIR DISPOSITION BELOW

The question of whether the trial court had unduly emphasized the Commonwealth's testimony and had in part distorted it to the defendant's prejudice was raised by specific exception at the close of the oral charge (R. 186a). These objections were renewed by Petitioner's Motion for a New Trial, in which he contended that the over-emphasis upon the Commonwealth's testimony had deprived him of a fair trial (R. 195a). He also argued that the trial judge "by gestures, facial expressions and inflections of voice" in effect had become the *"alter ego"* of the Commonwealth's witnesses (R. 207a). The Motion for a New Trial was refused.

On appeal to the Supreme Court Petitioner argued that the court had misquoted testimony and over-emphasized the Commonwealth's evidence. These issues were not expressly set forth as questions involving Petitioner's rights under the 14th Amendment, but in the brief filed in the Superior Court it was argued that constitutional safeguards had been ignored and Petitioner deprived of a fair trial. The Superior Court held that the charge was accurate and fair and did not mislead the jury to the Petitioner's prejudice.

In the Petition for Allowance of Appeal to the Pennsylvania Supreme Court Petitioner argued that the misquotations of testimony by the trial judge had deprived him of a fair trial. The Petition was refused without opinion.

ARGUMENT

In a State Criminal Case, Where the Trial Judge Distorts the Testimony and Over-Emphasizes the Commonwealth's Case, Petitioner Has Been Deprived of the Fair Trial Guaranteed by the Due Process Clause of the Fourteenth Amendment. This Question Has Not Previously Been Decided By This Court.

This case raises the issue of whether a federal constitutional right under the Fourteenth Amendment has been violated by the failure of a state court judge to observe that fairness and impartiality which the due process clause of the Fifth Amendment guarantees in federal court proceedings. We find no case in which this Court has reviewed a state court case raising the contention that the conduct of the trial judge may violate federal due process.

This Court has, however, established the basic principle, applicable to state courts as well as to federal, that a fair trial in a fair tribunal is a basic requirement of due process: *In re Oliver,* 333 U.S. 257 (1947); *In re Murchison,* 349 U.S. 133 (1954). These cases, involving the Michigan system of one man judge—Grand Jury, dealt with bias and partiality of the judge based upon his having been part of the accusatory process. *Tumey v. Ohio,* 273 U.S. 510 (1926), involved bias arising from the fact that the judge had a financial interest in the defendant being found guilty. If factors dehors the trial itself can give rise to disqualification of a judge as a "fair tribunal", why should not his actual conduct of

the trial, where unfairness is evident, also violate the constitutional requirement?

Recent decisions of this Court make it evident that the concern must be not only for a properly constituted tribunal, but also for the way in which its work is done. Thus, this Court in cases too numerous to mention has scrutinized the conduct of the trial itself, finding a deprivation of constitutional rights if, for example, the defendant has been deprived of counsel in a situation where counsel should have been afforded, or if a coerced confession has been used against him, or where the state has knowingly used perjured testimony in order to secure a conviction.

We submit that the protection of the defendant against unfairness on the part of the trial judge in the manner in which he has actually conducted the proceedings is just as essential as the other aspects of a fair trial which have already been accorded constitutional protection. If a trial dominated by mob violence is a nullity *(Moore v Dempsey,* 261 U.S. 86), so is a trial in which a guilty verdict has been obtained by improper actions on the part of the trial judge.

This principle has, of course, been often recognized in federal court cases. In *Starr v. United States,* 153 U.S. 614, 626 (1894), reversing a conviction by reason of undue advocacy on the part of the trial judge, Chief Justice Fuller spoke as follows:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with defer-

ence and may prove controlling, *Hicks v. United States,* 150 U.S. 442, 452."

Because of this pre-eminent importance of the trial judge to the whole judicial process, fairness on his part becomes of crucial importance.

In *Quercia v. United States,* 289 U.S. 466 (1933), Chief Justice Hughes had occasion to review the function of the judge under the common law and as assured by the Constitution, speaking as follows:

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary or uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference and may prove controlling'. This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided'. *Starr v. United States,* 153 U.S. 614, 626; *Hickory v. United States,* 160 U.S. 408, 421-423."

Argument.

In this Court the question of trial court fairness has most often arisen in connection with the expression of opinion, although other forms of judicial conduct may entitle a defendant to relief, as indicated by the above quotation from *Quercia.* In *Murdoch v. United States,* 290 U.S. 389 (1933) this Court substantially curtailed the right of the trial judge to express an opinion on the guilt or innocence of the defendant, recognizing that even where the jury is instructed that, as ultimate triers of the facts they may disregard the opinions of the judge, the significance accorded to the expression of judicial opinion requires restraint. Since *Murdoch* a number of circuits have interpreted the rule to be that the judge may express his opinion only in those exceptional cases in which the facts essential to the proof of guilt are virtually undisputed: *Hartzell v. United States,* 72 F 2d 569 (1934); *Billeci v. United States,* 184 F 2d 394 (D.C. Cir. 1950); *United States v. Link,* 202 F 2d 592 (3 Cir. 1953); *Davis v. United States,* 227 F 2d 568 (10 Cir. 1955).

The instant case does not involve the expression of an opinion by the trial judge, which is permitted under Pennsylvania law: *Commonwealth v. Chambers,* 367 Pa. 159, 164, 79 A. 2d 201, 204 (1950). Rather it involves something much more subtle, and consequently more difficult to attack. Perhaps carried away by the nature of the crime, which he referred to as "possibly one of the most heinous that you have ever heard of" (R. 142a), the judge throughout dramatized the testimony of the Commonwealth's witnesses, and related it in the first person in direct and positive statements which were an exaggerated version of what the witness had actually

said. Thus identifications which admittedly had been made only after the victims had seen Petitioner's picture in the newspaper, and which were not based upon any distinguishing marks or characteristics, were nonetheless treated by the court as positive identifications. An example will indicate the point. Commonwealth witness Catino testified that after he saw Petitioner's picture in the paper he went down to the Detective Bureau and picked him out of a stand-up. On direct examination he was asked if he could see the man who took his money in the courtroom, Catino's answer was "I don't know, I think the man over there (indicating)" (R. 80a-81a). In the court's version of this testimony it became: "I saw his picture in the paper; I couldn't forget that face." (R. 171a). Other identification testimony was similarly handled.

The distortion of the testimony was also glaringly apparent in respect to the discussion of the alibi evidence. The police report had fixed the time of the crime at shortly before 10:20 A.M. Haas himself testified that he had gone to the bank (which opens at 9:00 A.M.), stopped at the grocery store and the shoemaker's, and walked to a point approximately two miles from the bank when the crime was committed. Thus, by the strictest accounting of time, the robbery could not have occurred prior to 9:30 A.M. and in all probability occurred a few minutes before the complaint was made at 10:20 A.M. For the period from 9:30 A.M. until after 11:00 A.M. Petitioner had an alibi supported by two disinterested witnesses and by an exhibit—the certified check which the bank teller testified he had issued prior to 11:00 A.M. This alibi was not controverted by the Commonwealth's

witnesses. Yet in summarizing the alibi evidence, the Court instead of submitting this as an issue of credibility, emphasized the uncertainty of Haas as to the time in such a way as to suggest unmistakably that the crime could have been committed prior to 9:30 A.M., although there was not a scintilla of evidence to support such a theory (R. 155a).

The above examples of the manner in which the trial court submitted the case to the jury will suggest the basis for our contention that the judge did not preside with impartiality, avoiding even the appearance of advocacy: *Banning v. United States,* 130 F 2d 330 (6 Cir. 1942), cert. denied, 317 U.S. 695; *Frantz v. United States,* 62 F 2d 737 (6 Cir. 1933). We submit that the conduct of a judge may be such as to deprive the accused of a fair and impartial trial, even though no single instance involved error so prejudicial as to warrant reversal: *Egan v. United States,* 287 Fed. 958 (D.C. Cir. 1923).

We contend that the very factors to which this Court made objection in the case of *Quercia v. United States*— i.e., that the court assumed the role of the witness, distorted the testimony, reviewed it in a one-sided fashion, and suggested theories not warranted by the evidence—are present in this case. If the guarantees of the Fifth Amendment protect an accused against such things in a federal court, the due process clause of the Fourteenth Amendment should likewise assure fair treatment in the state court: cf. *Heiner v. Donnan,* 285 U.S. 312, 326 (1932).

Due process of law, under the Fourteenth as well as the Fifth Amendment, guarantees to the accused "that fundamental fairness essential to the very concept of

justice": *Lisenba v. California,* 314 U.S. 219 (1941). This principle must necessarily cover the manner in which the trial is conducted, as well as the qualifications of the judge or the persons chosen to serve as jurors. This application for review, presenting as it does the possibility of establishing a principle of constitutional law not heretofore determined by this Court, is consequently of significance to many others than this Petitioner.

CONCLUSION

Counsel for Petitioner is well aware of the burden which in recent years has been imposed upon this Court by requests for review in state court criminal cases. But where a Petitioner who feels that he has been done a grievous injustice has a case in which is presented a novel constitutional point, recourse to this Court is unavoidable.

For this reason, Petitioner respectfully prays that this court issue a writ of certiorari to the Supreme Court of Pennsylvania, to review its order refusing to hear his appeal from the judgment of the Superior Court of Pennsylvania affirming his conviction.

Respectfully submitted,

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APPENDIX

Opinion of the Superior Court

COMMONWEALTH v. COLLURA

Superior Court of Pennsylvania

December 28, 1956

Louis Glasso, Pittsburgh, for appellant.

Samuel Strauss, William Claney Smith, Asst. Dist. Attys., Edward C. Boyle, Dist. Atty., Pittsburgh, for appellee.

Before RHODES, P.J., and HIRT, GUNTHER, WRIGHT, WOODSIDE, ERVIN and CARR, JJ.

GUNTHER, Judge:

The defendant, an ex-constable, was tried on ten indictments, six charging robbery and four charging false impersonation of an officer. He was acquited on six charges and found guilty on Nos. 96, 97 and 98 February Term, 1956 (O & T) charging robbery, and on No. 349 February Sessions, 1956 (Q.S.) charging the misdemeanor of impersonating an officer.

Motion for a new trial assigning the reasons that (a) the verdict was against the weight of the evidence, and (b) that the charge was prejudicial to the defendant was refused by a court en banc. Defendant was sentenced to pay the costs of prosecution, a fine of one dollar and be committed to the Western Correctional, Diagnostic and Classification Center to undergo imprisonment for a term of not less than five years nor more than ten years. Identical sentences were imposed at Nos. 96, 97, and 98, to run concurrently; sentence was suspended in the case at No. 349.

From these sentences the defendant now appeals.

Appendix.

Counsel for defendant submits for our review statements of three questions involved.

(1) Are the verdicts against the weight of the credible evidence?

(2) Did the court commit reversible error in misquoting certain testimony in its charge?

(3) Did the court in its charge so emphasize the testimony as to commit reversible error?

The court en banc answered the questions in the negative.

Our review of the testimony reveals that the victims in each case were elderly men. They were followed by a person in a car who stopped and ordered them into the car under the pretext that defendant was conducting an investigation. The victims were searched and relieved of their valuables either by force or threats. One of the victims, John Hass, testified that he noted the license number of the car to be 31EEI or F. He identified the defendant in a police stand-up and also identified him at the trial. John Alexander, another victim, testified that he noted the first four digits of the license number of the car to be 31EE. He identified the defendant in a police stand-up and also identified him at the trial. The victim, Gaetano Catino, identified the defendant at a police stand-up and at the trial. Defendant contends that the evidence, with reference to identification, is incredible and unreliable. The lower court in its opinion, however, specifically points out that the guilty verdicts were returned only in those cases where the victims identified the defendant without hesitation in a police stand-up after the robbery, as well as at the time of trial. In each instance, where guilty verdicts were returned,

the crime was committed in broad daylight and the victims had a good look at the defendant.

In Commonwealth v. Kloiber, 378 Pa. 412, 106 A. 2d 820, the Court said: "Where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross-examination, positive and unqualified, the testimony as to identification need not be received with caution—indeed the cases hold—his (positive) testimony as to identity may be treated as the statement of fact." See Commonwealth v. Ricci, 161 Pa. Superior Ct. 193, 54 A. 2d 51; Commonwealth v. Sharpe, 138 Pa. Superior Ct. 156, 10 A. 2d 120.

At the trial, one of the victims identified the defendant as follows:

Q. I want you to look at the men and see whether or not you see the man here in the court room.

A. He is sitting right there.

Q. Are you absolutely sure?

A. As there is a God in heaven, there is the man that robbed me.

Credibility of the witnesses is for the jury, and if there is sufficient evidence to sustain a conviction it will not be disturbed by our appellate courts.

There is other testimony to the effect that Valerie Hass, the victim's daughter, testified that the day following the robbery the wife and daughter of the defendant came to their home, and offered to pay the money back if the victim would go to the magistrate and say that he had made a mistake.

In committing the crime in Alexander's case, the defendant posed as a Social Security investigator. He searched the victim and took from him $47.50. The victim stated that he observed the defendant in daylight for fifteen minutes while the crime was being committed.

In the Catino incident, the defendant posed as an F.B.I. agent investigating some trouble in the housing project. He relieved Catino of $48.00. There was no question of identity; the evidence was clear and unmistakable.

Concerning questions 2 and 3, counsel for defendant contends that the court in its charge misquoted and overemphasized the Commonwealth's testimony so as to warrant the granting of a new trial. We have read the charge of the trial judge and find no errors to substantiate defendant's contention on that phase of the case.

In the case of Commonwealth v. Evancho, 175 Pa. Superior Ct. 225, 103 A. 2d 289, in an opinion by Judge Woodside, this Court held—"In his charge the judge is not required to review in detail the testimony of the defendant or his witnesses, nor pick out for emphasis that believed by defense counsel to be advantageous to his client." Judge McCreary in the instant case instructed the jury, inter alia, as follows: "We will say this to you. The mere fact that we make references to certain phases of the testimony, and leave out references to others, does not mean that you are to disregard the parts concerning which we say nothing. You consider all the testimony whether to make reference to it or not, and if, inadvertently, the judge makes a mistake in his recital of what some witness said from the witness stand, you correct that from your own recollection, because you are the sole judges of the facts."

The function of determining the guilt or innocence of the defendant was left to the jury. A reading of the entire charge will reveal that as a whole it is accurate and fair, and it did not mislead the jury to the defendant's prejudice. In this connection see Commonwealth v. Palskin, 372 Pa. 402, 93 A. 2d 704. A charge must be considered in its entirety and error cannot be predicated on certain isolated excerpts from the charge. There is no merit in defendant's contention that the court showed any leaning toward the side of the Commonwealth.

In Commonwealth v. Chambers, 367 Pa. 159, 79 A. 2d 201, Justice Bell said: "While the main purpose of a judge is to state and explain the law and briefly review the evidence, it is always the privilege and sometimes the duty of a trial judge to express his own opinion, including his opinion of the weight and effect of the evidence or its points of strength and weakness, or even the guilt or innocence of the defendant and the verdict which, in his judgment, the jury should render, provided (1) there is a reasonable ground for any statement he may make; and (2) he clearly leaves to the jury the right to decide all the facts and every question involved in the case, regardless of any opinion of the court thereon."

The trial judge left to the jury the right to decide the facts, and we find no merit in defendant's contention to warrant a new trial.

Judgment and sentence are affirmed.

Order of the Supreme Court of Pennsylvania

And now, February 8, 1957, Petition denied.

PER CURIAM.